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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 249

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

Petitioner,

—*vs.*—

EDWARD MOSTYN,

Plaintiff-Respondent,

—*vs.*—

S. H. GOLDEN COMPANY, INC.,

3rd Party Defendant-Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE 3RD-PARTY DEFENDANT-RESPONDENT, S. H. GOLDEN COMPANY, INC., IN OPPOSITION.

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Opinions Below.

There were two opinions by Judge Stephen W. Brennan in the United States District Court for the Northern District of New York. Neither has been officially reported. They appear at R. 31-36 and at R. 382-388.

The prevailing opinion of the Circuit Court of Appeals for the Second Circuit, which was written by Judge Learned Hand with whom Judge Clark concurred, is not yet reported. It appears at R. 399-405. The opinion of Judge Swan, who dissented in part, appears at R. 405-406.

Jurisdiction.

The judgment of the court below was entered May 9, 1947 (R. 407). The petition for certiorari was filed August 8, 1947. This court's jurisdiction is invoked under Section 240 (a) of the Judicial Code, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938.

The jurisdiction of the lower court was invoked by the plaintiff-respondent, whose action was against the petitioner, under the Federal Employers' Liability Act, 45 USCA 51-60, April 22, 1908, c. 149, Sections 1-10, 35 Stat. 65-66 as amended and added by Apr. 5, 1910, c. 143, Sections 1-2, 36 Stat. 291; Mar. 3, 1911, c. 231, Section 291, 36 Stat. 1167 and Aug. 11, 1939, c. 685, Sections 1-3, 53 Stat. 1404. The third-party defendant-respondent became a party through the commencement by the petitioner of a third-party action upon an indemnity agreement.

Statement of the Case.

The accident out of which this action arose occurred on August 12, 1944 (R. 48) at about one o'clock in the morning (R. 110). The plaintiff-respondent, hereinafter called Mostyn, was a trackman employed by the petitioner in the maintenance of its tracks (R. 62). While so employed, Mostyn lived in camp cars owned by the petitioner and located upon a temporary siding at Sherburne, New York (R. 64-65). The petitioner contracted [1] with the third party defendant-respondent, hereinafter called Golden, for the operation of these cars as living quarters (R. 285); and pursuant to the contract, Golden operated a kitchen and commissary, furnished bedding, and cleaned the cars. The petitioner deducted a fixed amount for board and lodging from the wages of employees who lived in the cars and paid these amounts to Golden (R. 86).

On the night of the accident, Mostyn did not sleep in his bunk at the camp but lay down, instead, in an area about five feet wide between a building and the nearer rail of a switch track (R. 109). This place was about opposite the car in which Mostyn had his bunk (R. 103) and about twenty feet from it (R. 224, Ex. B). He fell asleep and did not awaken (R. 81) until an engine, owned by the petitioner (R. 58) and backing down the switch track (R. 166) to pick up and remove certain refrigerator cars (R. 238), had so injured his right leg as to require amputation of his right foot (R. 92).

It was the claim of Mostyn that he was unable to sleep in his bunk car because it was infested with vermin and

[1] Infra, P. 6.

that upon complaint to the foreman of his work gang, an employee of the petitioner, he had been given permission to sleep outside upon the ground (R. 78). He claimed, too, that he had been assured by the foreman that the switch track was dead and that there would be no operation upon it at night (R. 74). He thus accounted for his sleeping at the ill-fated spot.

Mostyn began an action against the petitioner under the Federal Employers Liability Act, supra, to recover for his injury. His action was based solely upon the negligence of the petitioner in its operation of the engine which caused the injury (R. 15). The petitioner, by a third-party action, claimed indemnity from Golden upon the contract for the operation of the bunk cars. The contention was that, if vermin were in fact in the car and Mostyn recovered, Golden was liable over to the petitioner upon the indemnity provisions of the contract (R. 20-24).

The trial was by judge and jury. A $10,000 verdict in favor of Mostyn against the petitioner (R. 370), and a like verdict in favor of the petitioner against Golden upon the indemnity agreement (R. 375), were returned. Judgment was entered upon them (R. 389-390). Golden appealed to the Court below from the judgment and from the denials of motions it had made (R. 394-396). Insofar as it was adversely affected, the petitioner did likewise (R. 391-393).

The Court below, Judge Swan dissenting, affirmed the judgment against the petitioner (R. 399-407). It reversed, unanimously, the judgment against Golden and dismissed the third-party complaint (R. 399-407).

Question Presented.

The petitioner's action against Golden presents but a single question: Under the law of New York, do the indemnity provisions [2] of the contract between the petitioner and Golden provide for the indemnity of petitioner against the latter's liability to Mostyn, such liability having been occasioned by the petitioner's own active negligence?

Summary of Argument.

Golden submits that the petition, insofar as it seeks review of the reversal of the judgment against Golden by the court below, should be denied for the following reasons:

1. The question of the interpretation of the indemnity agreement is controlled by the law of New York. That law is that a contract of indemnity will not be construed to indemnify a person against losses arising out of his own active negligence unless such an intention is expressed in unequivocal terms. The loss for which the petitioner is seeking indemnity was occasioned by its own active negligence. The agreement does not provide in unequivocal terms for indemnity against such a loss. The decision of the Court below, therefore, is not in conflict with the applicable New York decisions.

2. Mostyn's action against petitioner and that of petitioner against Golden are separate, distinct and independent, as are the questions to which each has given rise. That part of petitioner's application which relates to the former action may be granted without granting that part which relates to the latter. Each part must be considered sepa-

[2] Infra, P. 7.

rately, therefore, and whatever merit there may be in the application so far as it relates to the Mostyn judgment adds nothing to the petitioner's application in the action against Golden.

ARGUMENT.

POINT I.

The decision of the Court below is not in conflict with the applicable New York decisions.

The provisions of the contract between Golden and the petitioner for the maintenance and operation of the camp cars were stipulated by counsel as follows (R. 285):

> "It is stipulated between the D. L. & W. RR. Co. and the S. H. Golden Company, Inc. that on January 1, 1943. the Railroad and S. H. Golden Company, Inc., entered into a contract for an adequate consideration which was in force and effect during the year 1944, including the months of June, July and August of that year, and that pursuant to the terms of said contract during those months the S. H. Golden Company, Inc., maintained the labor camp referred to in the testimony in this case just south and west of the station at Sherburne, N. Y., and
>
> It is further stipulated that pursuant to said contract the S. H. Golden Company, Inc., agreed to furnish bedding, food, lodging and laundry service to the men who lived at the camp; and further to keep the said camp in a clean, neat, sightly, and sanitary

condition, and to allow no nuisance to be created upon or in the vicinity of said camp.

It is stipulated further that the Railroad Company furnish for said camp the track, the cars, the permanent fixtures, including tables, chairs, and benches in the cars, together with light, water and fuel."

The indemnity agreement contained in the contract is this (R. 285-286):

"To be fully and wholly responsible for any and all loss of life or property or injury or damage to person or property of any person or corporation, including the parties hereto and their respective officers, agents and employees, which loss, injury or damage may be due to, or arise out of, or result from or be in any way connected with the services to be performed by the contractor hereunder, or the performance or lack of performance thereof, or any act or omission of the contractor, its agents or employees in any way related thereto, and to indemnify and save harmless the Railroad Company from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expenses and liability of every name and nature (including all reasonable expenses which may be incurred by the Railroad Company in defending any such action, claim or demand) which may arise or result, directly or indirectly, from or by reason of any such loss, damage, or injury, or from or by reason of the failure of the contractor fully to keep, perform and fulfill each and every agreement and condition in this contract contained on its part to

> be kept, performed and fulfilled. The contractor further agrees to be fully and wholly responsible for injury to or death of its agents, employees, invitees, and licensees occurring on the premises of the railroad company in the vicinity of said camps, and to indemnify and save harmless the railroad company from and against any and all claims, demands, actions, judgments, awards of any kind, damages, losses, costs, expenses and liabilities of every name and nature (including all reasonable expenses that may be incurred by the railroad company in defending any such action, claim, or demand) which may arise or result, directly or indirectly, from or by reason of such injury or death."

The controversy between petitioner and Golden involves interpretation of the indemnity agreement. The petitioner contends that the agreement provides indemnity to it for the judgment obtained by Mostyn. Golden disagrees. Its contention is that the petitioner's liability to Mostyn arose out of the petitioner's own active negligence and that the parties did not intend by the agreement to safeguard the petitioner from the results of such negligence. The Court below agreed with Golden.

No argument has been made by the petitioner, as indeed none could, that there was not a finding of active negligence implicit in the verdict of the jury for Mostyn. The propriety of that verdict is not a matter of contest between the petitioner and Golden. When the court below affirmed the judgment for Mostyn, therefore, the issue for review in the third-party action was single and clear-cut: Did the agreement provide for the indemnification of the petitioner against losses occasioned by its own active negligence?

Resolving this issue, the court below determined and applied the New York law relating to the construction of indemnity contracts. In the words of its opinion, the court determined that law to be (R. 404):

> "* * * that if the indemnitee means to throw the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any peradventure of a doubt."

Having thus stated the rule, the court reversed the judgment against Golden. By so doing, it found that the agreement lacked an unequivocal expression of the purpose the petitioner contended was evidenced in it.

The petitioner now urges that this decision of the court below is probably in conflict with the applicable decisions of the New York courts. It is not clear from the petition whether petitioner feels the court erred in determining or in applying the New York law. In either event, as is below demonstrated, the opinion of the petitioner is mistaken.

The New York law applicable to indemnity agreements is that such a contract will not be construed to indemnify a person against his own active negligence unless that intention is expressed in unequivocal terms. That this is the established rule in New York is beyond doubt.

Semanchuck vs. Fifth Ave. & 37th St. Corp. (1943), 290 N. Y. 412.

Schwartz vs. Merola Bros. Construction Co. (1943), 290 N. Y. 145.

Walters vs. Rao Electrical Equipment Co. (1942), 289 N. Y. 57.

Employers' Liability Assurance Corp., Ltd., vs. Post and McCord Inc. (1941), 286 N. Y. 254.

Thompson Starrett Co. vs. American Mutual Liability Insurance (1937), 276 N. Y. 266.

Thompson Starrett Co. vs. Otis Elevator Co. (1936), 271 N. Y. 36.

Petkinic vs. Marc Eidlitz & Son Inc. (1934), 266 N. Y. 437.

Manhattan Railway vs. Cornell (1891), 54 Hun. 292, aff. 130 N. Y. 637.

Amitrano vs. Board of Education, Sup. Ct. Kings Co. (1945), 55 S. (2) 535.

In the Schwartz case, the Court stated: (Italics supplied)

> "While the parties are free to contract as between themselves for the ultimate burden of liability due to negligence, yet in the absence of *explicit language* to the contrary, courts will not interpret an indemnity agreement as a promise by the indemnitor to save harmless the indemnitee on account of the active negligence of the latter. * * * Clearly the wording of the indemnity agreement in the case at bar is not sufficiently broad to require indemnification if the injury to the plaintiff can be charged to active negligence on the part of the Bank."

Not one of the New York cases cited by the petitioner questions this rule. Each of them was concerned with its application. Each falls into one of two groups according to the question it presented. In the first group are those

cases in which the active or passive nature of the indemnitee's negligence, if any, formed the issue; in the second, those cases in which the problem was whether or not the indemnity sought was promised in unequivocal terms.

The following of the cases[3] cited by the petitioner fall into the first group: *Schwartz v. Merola Bros. Construction Corp.*, 290 N. Y. 145, 153-156, 157-159; *Turner Construction Company v. Rockwood Sprinkler Company of Mass.*, et al., 275 N. Y. 635 (See *De Haen v. Rockwood Sprinkler Co.*, 258 N. Y. 350)[4] and *Post & McCord, Inc. v. N. Y. Municipal R. Corp.*, 187 App. Div. 167, 173-175, affd. 230 N. Y. 540. Indemnity was allowed in each of them only after a finding that the indemnitee had been guilty either of no negligence or of passive negligence.

Semanchuck v. Fifth Avenue & 37th St. Corp. (1943), 290 N. Y. 412,[5] to which the petitioner also refers, is in this group too. It illustrates a situation in which indemnity was denied because of the affirmative negligence of the indemnitee. The concern of the court with the New York Labor Law in that case was to determine if Section 241 thereof created a positive duty whose violation would constitute active negligence. This determination was necessary in order to apply the rule above set forth to the facts of the case. Nothing in the decision limits the application of the rule to cases in which Labor Law violations are present. Its inquiry was directed solely to whether common law standards of active or passive negligence could be applied to violations of Section 241.

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[3] P. 17, 18, Petition.

[4] See opinion in Appellate Division, 249 A. D. 509, and Dudar v. Milef Realty Corp., 258 N. Y. 415.

[5] P. 18, Petition.

The following of the cases[6] cited by the petitioner fall into the second group: *Long Island Railroad Co. v. American Bridge Co.*, 175 App. Div. 170, 172-174, affd. 225 N. Y. 692 and *Westinghouse, Church, Kerr & Co. v. L. I. R. R. Co.*, 160 App. Div. 200, affd. 216 N. Y. 697. Recovery by the indemnitee was permitted in each of them only after a determination that the indemnitor had unequivocally promised to indemnify for the consequences of the specific activity out of which the indemnitee's liability arose.

Wischnie v. Dorsch, 296 N. Y. 257 (Adv. Sh. No. 419) is also cited by the petitioner to demonstrate the error of the court below.[7] Such a demonstration is not made by this case. The court was testing upon a motion the sufficiency of a cross-claim for indemnity based upon common law principles. It held the cross-claim sufficient because the wrongdoing of the indemnitee, as set forth in the pleadings, did not constitute active negligence. The inquiry by the court into the nature of the indemnitee's negligence reaffirmed rather than questioned the rule applied by the court below.

The decisions of this Court and of the lower Federal Courts cited by petitioner[8] do not apply New York law and are not controlling in the instant case. A discussion of them is, therefore, unnecessary.

It is thus clear that the Court below did not err in determining the New York law applicable to petitioner's claim against Golden. And that it did not err in the application of such law is demonstrated by the *Petkinic* case, supra.

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[6] P. 17, 18, Petition.

[7] P. 19, Petition.

[8] P. 18, Petition.

The official report of the Petkinic case is somewhat sketchy. The facts are revealed in the record on appeal. Eidlitz was the general contractor and McGratty was a sub-contractor. The general contractor erected a temporary partition of plaster board and lumber but instead of fastening it correctly, merely leaned it against timbers or uprights where it might fall if pushed. The plaintiff was changing his clothes near the partition when employees of the sub-contractor negligently dislodged the partition, and it fell on the plaintiff. Plaintiff sued both contractor and sub-contractor and recovered a verdict against both. The general contractor moved for judgment over on his cross complaint, relying on the following indemnity agreement (fols. 574-576 of the record on appeal. Italics supplied):

> "The sub-contractor hereby assumes entire responsibility and liability for any and all injuries to any and all persons, including the sub-contractor's employees, and for any and all damage to property *caused by or resulting or arising out of any act or omission on the part of the sub-contractor under or in connection with the contract and/or the prosecution of the work thereunder*, and shall indemnify and save harmless the owner and general contractor from and against any and all loss and/or expense which they or either of them may suffer or pay as a result of claims or suits due to, because of or arising out of any and all such injury and/or damage, whether real or alleged, and the sub-contractor, if requested, shall assume and defend at his own expense any such suits."

The Trial Court said (fols. 857-858 of the record on appeal. Italics supplied):

> "Motion denied. Here the jury has found both of the defendants at fault and jointly responsible for this accident. If it were the purpose of that part of the agreement between Marc Eidlitz & Sons, Inc., as contractor, and McGratty and Sons, as sub-contractors, set forth in paragraph fourth of the answer, to hold the sub-contractor liable for the participating negligent acts of the employees of the general contractor, *certainly such a drastic extension of liability should not have been left to conjecture when without any difficulty it could have been expressed in clear and understandable English so that he who runs may read.*"

The general contractor appealed but the Appellate Division and Court of Appeals both affirmed the judgment without opinion. (241 A. D. 720, 266 N. Y. 437.)

POINT II.

A review of the judgment of the court below in favor of Golden is not required even if it be determined that a review of the judgment for Mostyn should be had.

Mostyn's action against the petitioner is based upon negligence and the Federal Employers' Liability Act, supra. The petitioner's action against Golden is upon contract and is governed by New York law. The questions in each are distinct and independent. The two actions might have been brought separately; it was only for convenience that they were tried together.

Golden expresses no opinion of the merits of the petition so far as it relates to Mostyn. It does urge, however, that whatever those merits may be, they add nothing to that part of the application which relates to Golden. And no sufficient reason for this Court's action appears in that part of the petition.

CONCLUSION.

The petition, so far as it relates to Golden, should be denied.

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